IN THE

# Supreme Court of the United States

Supreme Court, U.S.
FILED
MAY 25 1966
JOHN F. DAVIS, CLERK

October Term, 1965

No. ~~1-3-5-2~~ 170

VIRTUE BROS., ANCHOR POST PRODUCTS, INC. OF CALIFORNIA, and CLAYTON MANUFACTURING COMPANY,
*Petitioners,*

*vs.*

THE COUNTY OF LOS ANGELES, *et al.*,
*Respondents.*

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**Petition for a Writ of Certiorari to the California District Court of Appeal, Second District, Division II.**

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*Respondents.*

**Petition for a Writ of Certiorari to the California District Court of Appeal, Second District, Division II.**

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the District Court of Appeal, Second District, Division II of the State of California, entered in the above-entitled case on March 8, 1966.

## Citations to Opinions Below.

The Opinion of the District Court of Appeal is reported in 239 A.C.A. 237, 48 Cal. Rptr. 505 (1966) and is printed in Appendix A hereto, *infra* at page 1. The Opinion of the Trial Court delivered from the bench, is unreported and is printed in Appendix B hereto, *infra* at page 19. The denial of the Petition for a hearing in the Supreme Court of the State of California made on March 2, 1966, is reported in the Minutes of the Supreme Court of the State of California, for that date in 64 A.C. 2 (No. 5 Minutes, 1966).

## Jurisdiction.

The date of the Judgment of the District Court of Appeal was January 6, 1966. A timely petition for hearing in the Supreme Court of the State of California was denied on March 2, 1966, and the Judgment of the District Court of Appeal was entered on March 8, 1966. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3) (1948), since the constitutional immunity of imported property from state taxation is involved, and the equal protection of the laws clause of the Constitution is invoked.

## Questions Presented.

1. At what point in time does material imported for use in manufacturing and while still in the hands of the original importer lose its immunity from local taxation?
2. Does exempting from local taxation merchandise imported for resale while taxing merchandise imported for manufacturing violate the equal protection of the laws clause of the federal constitution?

## Statutes Involved.

United States Constitution, Article I, Section 10, Clause 1.

"No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws: . . ."

United States Constitution, Amendment 14, Section 1, Clause 4.

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

## Statement of the Case.

Four manufacturers who import raw materials for use in their manufacturing process brought suit to recover taxes levied by the County of Los Angeles on that imported material. In each instance, the manufacturer claimed as exempt so much of the material as was not required for its current operating needs. The exemption was claimed as to the material in excess of current operational needs on the grounds that under the Import Clause of the Constitution, the material was immune and on the further ground that merchandise imported fo resale was not taxed, thereby denying the importer manufacturer equal protection of the laws. Both issues were raised by the complaint in each case and answered by the defendants in each case. The cases were consolidated for pre-trial proceedings and for trial and are presented together here because the issues are identical.

Joint pre-trial statements were agreed to by counsel and accepted by the court as its pre-trial orders. The factual and legal issues were the same in all the cases. The question of fact was reduced to how much, if any, of the material was required for each plaintiff's current operational needs and the issue of law to how much if any of the material was exempt from taxation by reason of the import clause of the United States Constitution. A copy of the appropriate portions of each of the Pre-Trial Statements of Fact and Issues of Law is set out in Appendix C *infra* at page 29.

The equal protection issue was removed from the case by the Joint Pre-Trial Statement and Order which established the test of taxability to be the amount of merchandise required for the taxpayer's current operational needs and exempting the excess.

In one case (*Bemis*), the trial court found all the imported material exempt because no orders for fabrication were on hand on tax lien day and therefore no current operational requirement existed. Bemis had judgment as prayed. No appeal was taken from that decision.

In the three cases here, the court found a five day supply to be the current operational needs of each of the plaintiffs, exempted the balance of the material on hand, and gave judgment accordingly. Defendants appealed from those cases.

At the trial, defendants offered no evidence. In each case, plaintiff established that the merchandise was imported by it, kept in its warehouse or storage area in the original package until moved into the fabricating area according to a pre-established plan, and then actually used in the manufacturing process as needed.

The Appellate Court found, apparently as a matter of law, that all the imported material in the hands of an importing manufacturer was required for current operational needs irrespective of when in the future it was going to be used. That Court held further that any merchandise held for resale would be exempt if segregated by the importer and kept apart from the merchandise required for manufacturing. This was the first instance in the proceedings in which merchandise for sale was held to be entitled to treatment different from merchandise held for manufacture, and this is the first opportunity petitioners have had to raise the equal protection of the laws question.

Since a hearing in the State Supreme Court was denied, the petitioners seek a Writ addressed to the District Court of Appeal. Other matters at issue in the court below are not being presented here.

## Reasons for Granting the Writ.

### I.

The California Court has taken the position that merchandise imported for use in manufacture loses its immunity upon completing its journey at the manufacturer's warehouse. This view is in direct conflict with the rule laid down by this Court and as applied by the Supreme Courts of Ohio and Colorado. All three state cases seek to apply the rule of *Youngstown Sheet & Tube Co. v. Bowers,* 358 U.S. 534 (1959).

Ohio and Colorado followed the current operational needs test set out by *Youngstown* and excluded imported material in excess of the importers' current operating needs: *The City and County of Denver v. Denver Publishing Co.,* 153 Colo. 539, 387 P.2d 48 (1963), and *Orr Felt & Blanket Co. v. Schneider,* 3 Ohio 2d 14, 209 N.W. 2d 150 (1965).

The California Court permits the taking of everything at rest in the manufacturer's warehouse irrespective of the time in the future at which the material would be used.

The California Court said:

> The attempts to limit the application of *Youngstown* to materials on hand which can be replenished within a scheduled shipping time (as in the Colorado and Ohio cases) or to materials set aside to meet a production schedule, (as in the cases at bench) seem to us to emasculate the doctrine of *Youngstown* and leave no practical rule. *Virtue Bros., supra* at 246, 48 Cal. Rptr. at 511.

and,

We think too that the formula applied by the Colorado and the Ohio court is defective. *Id.* at 247, 48 Cal. Rptr. at 511.

The test in *Youngstown* has three elements, namely;

A. The importing process must have ended;

B. The merchandise must have been irrevocably committed to the manufacturing process; and

C. The merchandise must have been entered and used in manufacturing at that place.

The California court has omitted the last crucial element, saying, "In our opinion, *Youngstown* required that the full inventory in the possession of the plaintiff committed to the purpose of manufacture on the first Monday in March is subject to tax." *Id.* at 248, 48 Cal. Rptr. at 512.

The language in *Youngstown* is:

> Do the facts as stipulated and found in the cases before us, when considered in the light of applicable legal principles, show that these manufacturers *have so acted upon the imported materials* [Emphasis by the United States Supreme Court] as to cause them to lose their distinctive character as "imports" by irrevocably committing them, after their importation journeys have definitely ended, to "use in manufacturing" at the plant and point of final destination, and by "entering" and "using" them "in manufacturing" at that place? *Youngstown Sheet & Tube Co., supra* at 543.

The clear implication of *Youngstown* is that the importer-manufacturer must do something more to the merchandise than import it and bring it to rest in his warehouse. "Unlike *Hooven,* [*Hooven and Allison Co.*

*v. Eveatt*, 324 U.S. 652 (1944)] these are not cases of the mere storage in a warehouse of imported materials intended for eventual use in manufacturing but not found to have been essential to current operational needs." *Youngstown Sheet & Tube Co., supra* at 544.

II.

The California court improperly differentiates between merchandise imported for manufacturing and merchandise imported for resale. It stated:

> Since the constitutional immunity with respect to material for sale has not been removed, if a manufacturer imports to take advantage of price only and expects to use only a portion of the purchase for current operational needs, nothing in Youngstown prevents a good faith sale of the imported materials to others. It is simple enough to segregate materials intended for sale. Thus, there would be no tax on materials not irrevocably committed to manufacture. *Virtue Bros., supra* at 247, 48 Cal. Rptr. at 512.

Taken with the rest of the opinion, the California court's interpretation of current operational needs stretches to all the merchandise imported for ultimate use in the manufacturing process irrespective of how far in the future the merchandise might so be used.

This distinction between merchandise imported for manufacture and merchandise imported for resale is not founded on any demonstrably valid differentiation and is a clear violation of the equal protection of the laws clause of the Federal Constitution, contrary to the specific holding of *Hooven* which is specifically affirmed by *Youngstown*.

III.

In an industrial complex as highly competitive as most segments of the American economy, the foreknowledge of tax impact is necessary to the maintenance of a position of maximum competitiveness.

The increasingly widespread use of imported raw material by American processors therefore makes a clear definition of the rules of *Youngstown* and *Hooven* essential.

## Conclusion.

Because of the diametrically opposed interpretations placed on the *Youngstown* case by various state appellate courts, because of the widespread areas of the public interest which require a clear definition of the rules of *Hooven* and *Youngstown,* and because the court below erroneously construed and misapplied the import clause and the equal protection clause of the United States Constitution to the cases below,

This petition for Writ of Certiorari should be granted.

Respectfully submitted,

LOUIS R. BAKER,

*Counsel for Petitioner.*

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## APPENDIX A.

### Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Virtue Bros., a California corporation, Plaintiff and Respondent vs. The County of Los Angeles, and the City of Los Angeles, Defendants and Appellants. Civ. No. 28858.

Bemis Bros. Bag Company, a corporation, Plaintiff and Appellant vs. The County of Los Angeles, and City of Los Angeles, Defendants and Respondents. Civ. No. 28859.

Clayton Manufacturing Company, a corporation, Plaintiff, Respondent and Cross-Appellant vs. County of Los Angeles, Defendant, Appellant and Respondent. Civ. No. 28860.

Filed Jan. 9, 1966.

Anchor Post Products, Inc. of California, a corporation, Plaintiff, Respondent and Cross-Appellant vs. The County of Los Angeles, and the City of Whittier, Defendants, Appellants and Respondents. Civ. No. 28861.

Appeals from judgments of the Superior Court of Los Angeles County. Joseph W. Vickers, Judge.

For Plaintiffs: Messrs. Greenbaum, Baker & Ancel; by Louis R. Baker, Gerald T. Manpearl.

For Defendants: Harold W. Kennedy, County Counsel, A. R. Early, Deputy County Counsel.

All plaintiffs are manufacturers. Virtue Bros. (Virtue), imported plywood from Finland; Clayton Manufacturing Company (Clayton), imported steel tubing from the British Isles; and Anchor Post Products, Inc.

of California (Anchor), imported wire from Australia. Taxes were levied by the County of Los Angeles and the City of Los Angeles (defendants) upon the assessed valuation of full inventories of import materials in the possession of plaintiffs on the first Monday in March 1960, the taxing date.[1] Plaintiffs paid under protest and sued for a refund.

These cases present the constitutional question of when and the extent to which a local nondiscriminatory property tax may be levied upon materials imported for use by local manufacturers.

Article I, § 10, cl. 2, of the United States Constitution provides: "No State shall * * * lay any Imports or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: * * *."

Plaintiffs contend that only so much of the imported materials which are removed from their respective warehouses and specifically set aside for manufacture pursuant to production schedule are taxable.

The trial court agreed, and judgment for a refund was entered respectively for each plaintiff in the appropriate amount.

Defendants predicate this appeal[2] on the construction given to the import clause (*supra*) in the recent case of *Youngstown Sheet & Tube Co. v. Bowers,* 358

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[1]Revenue and Taxation Code, section 405 provides: "Annually, the assessor shall assess all the taxable property in his county * * * to the persons owning it * * * at 12 o'clock meridian of the first Monday in March. * * *."

[2]Plaintiffs Clayton and Anchor appeal from the judgment dismissing their fourth and fifth cause of action. Bemis, a plaintiff below, also appeals. No appeal was taken from the judgment in favor of Bemis.

U.S. 534 (1959), which they argue, asserts that the state may tax imported materials when the manufacturer has so acted upon the materials imported with full awareness of the realities of his business as to put them to use in a practical way.

The question posed, has like a sleeping dog, been allowed to lie although there have been some abortive kicks in the past. *Youngstown* however succeeded in arousing more than a growl or bark. The resolution of the long dormant question has a deep bite.

Judicial construction of the constitutional clause originates with *Brown et al. v. The State of Maryland,* 12 Wheat. 419; 6 L. Ed. 678 (1827).

We start at the source. Chief Justice Marshall, speaking for the Court, stated that case as follows: "The cause depends entirely on the question, whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported." (Id. p. 436.)

The Chief Justice held the tax unconstitutional and set forth reasons which, as might be expected, have been quoted and relied on ever since: "There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. * * * No goods would be imported if complished * * * by laying a duty on the thing imported in the hands of the importer. It is obvious that none could be sold. No object * * * can be accomplished by laying a duty on importation, which may not be ac- the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised." (Id. p. 439.)

Foreseeing the conflict between the inherent right of a state to tax and the constitutional inhibition to tax imports, he indicated that there must be a line of demarcation, and said: "* * * Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that *when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state;* but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." (Emphasis added.) (Id. pp. 441-442.)

California had an early brush with the doctrine of *Brown,* when in 1870, it levied a tax similar to the one in the case at bench, on champagne imported from France by commission merchants for purpose of sale. They paid duties and charges and thereafter stored the wine in their original case in their warehouse in San Francisco, where they remained for sale.

Citing *Brown,* Mr. Justice Field held at 13, Wall, p. 34. "* * * goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, until they have passed from the control of the importer or been broken up by him from their original cases. * * * The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the state to levy any taxes. * * *" (*Low v. Austin,* 13 Wall. 29; 80 L. ed. p. 517.)

*Youngstown* does not permit the type of state tax here levied on materials imported for sale. *Youngstown* affirms that materials imported for sale are still immune. It makes clear that materials imported for manufacture lose their tax immunity when required for current operational needs and irrevocably committed to the use for which they have been imported. Mr. Justice Frankfurter in a vigorous dissent, argues there is no distinction. He asserts that *Youngstown* overrules 132 years of unbroken law and that the reasoning of the majority opinion is applicable to imports for sale as it is to imports for manufacture.[3]

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[3]Mr. Justice Frankfurter said in part: "For one hundred and thirty-two years * * * this Court has held, without a single deviation, that a State may not tax imports from foreign countries while retained by the importer in their original * * * form prior to the use of the goods or their sale. Today the Court, * * * disregards this historic course of constitutional adjudication * * *. * * * And it does so, moreover, without overruling the decisions which the basis and logic of this new reading of the Constitution can no longer sustain. But they remain decisions of this Court. Thus, we are left with a confusing series of conflicting cases * * *. This confusion is substituted for a principle so plain of application that the controversies in this Court over the meaning of this far-reaching constitutional provision have numbered less than a dozen in our entire history." (Id. pp. 552-553.)

He says further: "If the merchant who imported goods for the purpose of sale was entitled to realize that purpose before being subject to state taxes, certainly the manufacturer who had imported goods in order to process them was entitled to no lesser privilege. Goods lying in a manufacturer's warehouse in their original form * * * are no more a part of the general mass of property of a State than are goods which are displayed by a commission merchant, in their original crates, for purposes of sale; * * *" (Id. p. 563.)

Again he says: "A close examination of the Youngstown Case makes apparent this effective reversal of all previous judicial decision on the Imoprt Clause * * *. The stipulation of facts merely provides that the ore had been imported for purposes of manufacture and that 'at least' three months' supply was generally kept on hand, * * * [T]here were no * * * findings, as to the rate of use of the ore, the immediacy of the need for it, or its relation to the

In *Youngstown* the facts were stipulated and showed the following operation: Ore was shipped from a foreign country. It was unloaded at the port of entry, thereupon reloaded and transported to *Youngstown's* place of business, unloaded, separated and placed in separate piles in separate areas of the ore yard. Daily manufacturing needs were taken from these piles, deposited into "stock bins" or "stock houses" holding one or two days' supply. As ore from a particular pile was consumed, other ore was brought in and unloaded on top of the remainder in the particular pile. This replenishment process was continuously repeated. All of the ore was taxed.[4]

In the cases at bench, the operation was substantially the same. In *Virtue*, tax was assessed against 67,895 pieces of plywood imported from Finland and warehoused in its original strapping on Virtue premises adjacent to their manufacturing plant. Thereafter, it was re-

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requirements of the plant, * * *. We have simply the fact that an inventory of ore was kept for eventual use. * * *" (Id. p. 571.)

Again, speaking of the plywood case, he says: "Formulas for the determination of current operational needs were discussed in detail by the Wisconsin courts, but the Court's opinion in Youngstown makes it unnecessary to examine those formulas here. For the reasoning of Youngstown makes it clear that not merely half, but all of the imported veneers can be properly taxed by Wisconsin, since they were all 'not only needed, imported, and irrevocably committed to supply, but were actually being used to supply, the daily manufacturing requirements of the plant.' I can only reiterate that the fact that goods were 'actually' to be used for the purpose for which imported is not, and has never been thought to be, relevant in determining their taxability under the Import Clause." (Id. pp. 572-573.)

[4] *Youngstown* also included *United States Plywood Corporation v. City of Algoma*. Algoma imported green lumber in bulk and veneers. In *Youngstown*, all the ore was taxed. In *Plywood*, one-half of the lumber and veneers on hand on the taxing date was found to have been "necessarily required to be kept on hand to meet the current operating needs of petitioner's manufacturing plant, * * *." (*Youngstown, supra*, p. 547.)

moved to the processing area of the plant where it was manufactured into table tops. Annually, Virtue consumes about 145,200 pieces. a 90-day supply is 38,400 pieces, and a five-day supply is 2,750.

Plywood orders must be placed with the mills in Finland approximately five months in advance of required arrival, and shipping time is approximately seven weeks. Shipments arrive monthly. However, a two months' minimum inventory of 24,200 pieces is maintained to provide for delay due to force majeure.

In processing plywood, a production schedule, based on current sales activity, is sent to the production department weekly. This schedule controls the volume of plywood and other materials required for production at any given time. The production supervisor of the plant testified that the minimum inventory required for production purposes was a five-day supply based on the weekly schedule.

All the plywood assessed was eventually used.

Except for the type and origin of material, amount imported and consumed annually, amount if any, in reserve for force majeure reasons, the facts in *Clayton* and *Anchor* are substantially the same.

Ten years before *Youngstown,* in *Hooven & Allison Company v. Evatt,* 324 U.S. 652, the Supreme Court, in a case similar on the facts to *Youngstown,* rejected the argument that imports for use in manufacture stored in a warehouse on the premises of the manufacturer, were subject to state taxation, appearing to hold that actual use of the material was required to destroy the immunity. In *Hooven,* the Court said: "* * * [W]hen [the imported materials are] used for the pur-

pose for which they are imported, they cease to be imports and their tax exemption is at an end." (Id. at p. 665.)

Comparing *Brown* and *Hooven,* the Court in *Youngstown* said at pp. 541-542:

"While Chief Justice Marshall did not undertake definitively to state just what acts or conduct of the importer would be deemed to have 'so acted upon the thing imported' as to cause it to be 'mixed up with the mass of property in the country [and to lose] its distinctive character as an import,' he did specify some of the acts that would so result. He held * * * [among other things] (3) that goods brought into this country by an importer 'for his own use' and here 'used' by him are to be regarded as part of 'the common mass' of property and are not immune from state taxation."

The Court added at page 542:

"Thus, though Brown v Maryland (US) supra, holds that goods brought into the country by an importer 'for his own use' are not exempted from state taxation by the Import-Export Clause, and Hooven & A. Co. v Evatt (US) supra, holds that they are, both agree that when the imported goods are 'used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end.' Hooven & A. Co. v Evatt, supra (325 US at 665). Compare Brown v Maryland, supra ((US) 12 Wheat at 441-443)."

Further distinguishing *Hooven,* the Court said in *Youngstown* at page 544:

"* * * Here the Ohio and Wisconsin courts have *in effect* held that the stipulated and found facts show that the imported materials that were taxed by those

States were so essential to current manufacturing requirements that they must be said to have entered the process of manufacture, and those courts have rested their judgments, in major part at least, on that ground. Our question therefore is precisely the one which the Court did not reach or consider in the Hooven Case." (Emphasis added.)

The court then proceeds to set forth those "stipulated and found facts" upon which taxability is based: "The stipulation in the Youngstown case shows that the imported ores were essential to the operation of Youngstown's Ohio plant; that Youngstown had imported them 'for use in manufacturing' and 'to meet its estimated [manufacturing] requirements' at the plant; that the ores had arrived at their destination, had been placed in 'piles' in the 'ore yards' of that plant, and their importation journey definitely had ended; that the ores were irrevocably committed to 'use in manufacturing' at that plant and point of final destination; and that the daily ore needs of the plant were conveyed from the 'piles' in the 'ore yards' to 'stocks bins' or 'stock houses,' holding one or two days' supply, from which they were fed into the furnaces. *Does not the stipulation thus show* that the ores were not only needed, imported, and irrevocably committed to supply, but were actually being used to supply, the daily requirements of the plant? It seems to us that these stipulated facts inescapably establish that Youngstown had 'so acted upon the [imported ores]' (Brown v Maryland, supra ((US 12 Wheat at 441) ), by using them 'for the purpose for which they [were] imported,' that they must be held 'to have then entered the manufacturing process' (Hooven & A. Co. v Evatt, supra (324 US at 665, 667)) and

to have lost their distinctive character as 'imports' and all tax immunity as such." (Id. 358 US at pp. 545-546; emphasis added.)

The Court stated and disposed of the question as follows: "Do the facts * * * when * * * considered in the light of applicable legal principles, show that these manufacturers *have so acted upon the imported materials* as to cause them to lose their distinctive character as 'imports' by irrevocably committing them, after their importation journeys have definitely ended, to 'use in manufacturing' at the plant and point of final destination, and by 'entering' and 'using' them 'in manufacturing' at that place? The manufacturers, relying upon their understanding of the Hooven case, argue that they do not, but we have concluded that they do." (Id. 358 US at p. 543.)

The Court at page 549 said further:

"The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When, after all phases of their importation had ended, they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, they stood in the same relation to the State as like piles of domestic materials at the same place that were kept for use and used in the same way. The one was then as fully subject to taxation as the other. In those circumstances, the tax was not on 'imports,' nor was it a tax on the materials because they had been imported, but because at the time of the assessment they were being used, in every practical sense, for the purposes for which they had been imported. They were therefore subject to taxation just like domestic property that was kept at the same place

in the same way for the same use. We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views pressed upon us by the manufacturers. Compare May v. New Orleans (178 US, at 509)."

Difficulties have been already encountered in the application of the *Youngstown* doctrine.

Since *Youngstown,* our attention has been called to two cases in which the *Youngstown* rule has been applied in a manner different from its application in the cases at bench.

In *The City and County of Denver v. Denver Publishing Company,* 153 Colo. 539, the Supreme Court of Colorado rejected the contention that a full 35-day inventory of newsprint imported from Canada was taxable by the state. The test, stated the Court, was not whether the materials were "held for use", for that criterion was advanced by Justice Black in his dissent in the *Hooven* case and was not adopted by the majority in *Youngstown;*[5] rather, the crucial issue is whether the materials were required to be kept on hand to meet "current operational needs." As to this test, the court said: "There is no rigid and inflexible rule which can be laid down to determine the 'current operational needs' of a taxpayer. This is an area where the policy of the law dictates *ad hoc* determination based on the facts presented in each particular case." (Id. at p. ....) The reviewing court then approved a formula devised by the

[5]It is to be noted, however, that Justice Black concurred in the majority opinion in *Youngstown.* It is inferable that that opinion was in conformity with his views on this matter, and such an inference would substantiate the opinion that we reach *infra.*

trial court which held that since it took six days for the taxpayer to replenish its supply of newsprint from Canada, and since the taxpayer used 60 tons of newsprint per day, the amount necessary for "current operational needs" was 360 tons, which amount was taxable. The reviewing court said that it could not conclude that such a formula was, as a matter of law, erroneous.

In *Orr Felt & Blanket Co. v. Schneider,* 3 Ohio 2d 14, the Ohio Supreme Court came to the same conclusion, citing copiously from *Denver,* in determining the taxable status of grease wool imported from Australia and stored in the taxpayers' warehouse. The Ohio court adopted the formula approved in *Denver.* It said at page ....: "This is a realistic, practical and rational rule and the facts upon which it is based are easily and accurately obtainable from the records of the taxpayer.

"If more of the imported goods are available than would be used before the time needed to secure a new supply would elapse this amount is excess and is not 'irrevocably committed to use in manufacturing'."

The attempts to limit the application of *Youngstown* to materials on hand which can be replenished within a scheduled shipping time (as in the Colorado and Ohio cases) or to materials set aside to meet a production schedule, (as in the cases at bench) seem to us to emasculate the doctrine of *Youngstown* and leave no practical rule.

In the cases at bench, the undisputed showing for each of the plaintiffs was that only a five-day supply of imported material was taken from the warehouse to meet the weekly production schedule of each of said plaintiffs and the trial judge held that only so much of

the manufacturer's inventory was taxable, irrespective of the size of the inventory and the undisputed fact that the entire inventory of the manufacturer was imported for manufacturing purpose.

In this age of automation, no stretch of the imagination is needed to visualize a conveyor belt from warehouse to the machine in a manufacturing facility. The unbroken package of plywood, ore or wire, as the case may be, could be placed on the conveyor belt in the warehouse and so treated that before it reached the machine, it would, in the process of conveyance, be broken, its contents separated, and conditioned, and thus fed into the machine. If such were the operation, it would appear that all that could be taxed would be the materials carried in the conveyor at noon on the first Monday in March. Noon being generally the lunch hour, it is not improbable that in spite of a huge inventory, none of it would be in the conveyor at that time.

Further, it is not unusual for a manufacturing plant to close down for a few days or a week or longer period during a manufacturing year.

Assuming a proper good faith shutdown, what is to prevent a manufacturer from electing to close down for a period of time which includes the first Monday in March? In such an event, the formula applied by the trial court would be completely nullified.

We think too that the formula applied by the Colorado and Ohio courts is defective. If all that a manufacturer requires for current operational needs is an inventory which will be expended just as the next regular shipment is unloaded at the manufacturer's plant, why is any inventory in excess of replenishment needs, so defined, ever maintained?

"Current operational needs" is a phrase predicted on the industrial facts of life, and must reflect the needs of a manufacturing business as an ongoing concern. It is doubtful whether the manufacturers of this state would, despite a decision upholding a tax on the full inventory in their plants, maintain a reduced inventory fitted in a Procrustean manner to meet the constitutional test so applied to them. Clearly, their operational needs require more.

Would not a manufacturer, for example, take advantage of price and shipping terms and overbuy in spite of knowledge of the tax? Such imported materials nevertheless have been committed for current operational needs within any fair industrial definition of that term since it is fair to assume that the manufacturer, even though temporarily overinventoried for reason of price, will at some future date adjust any real surplus. Since the constitutional immunity with respect to materials for sale has not been removed, if a manufacturer imports to take advantage of price only and expects to use only a portion of the purchase for current operational needs, nothing in *Youngstown* prevents a good faith sale of the imported materials to others. It is simple enough to segregate materials intended for sale. Thus, there would be no tax on materials not irrevocably committed to manufacture.

Moreover, no sound executive of any manufacturing concern would, in our opinion, consider that current operational needs were provided for, if, as a minimum, in addition to the inventory which can be replenished on a fixed shipping schedule, there were not adequate materials on hand to act as a complete hedge against deterioration, destruction, and loss caused by force majeure.

To us, it seems completely unrealistic to equate *ad hoc* testimony of a plant manager, a production or efficency expert, as to replenishment time or the quantity of materials needed for a production schedule, however factual such testimony may be, with the test set forth in *Youngstown* that imported material is taxable when required for current operational needs or requirements and has been so acted upon that it is irrevocably committed to manufacture.

There is language in *Youngstown* which supports the judgment of the seasoned and able trial judge in the cases at bench, and which lends support to the conclusions of the Colorado and Ohio courts. However, the facts before the court in *Youngstown* and the ultimate decision in the face of the Frankfurter arguments in dissent, indicate to us that the opinion speaks broadly of the state's power to tax. Much of the language in *Youngstown* which gives the complexion of validity to the formula adopted by the trial court, is used, in our opinion, to explain the consistency of *Youngstown* with past decisions of the Supreme Court.

The materials here in question had reached the end of their importation journey, and indiscriminate portions of the whole were actually being used to supply daily operating needs. The property tax upon them was nondiscriminatory; they were not singled out because they were imported, nor was the tax even remotely connected with the activity of importation. Had the materials been of domestic origin, they would have been fully taxable under the assessment now in dispute. By enforcing this tax, California is in no way taking undue advantage of its position as an importing state to the detriment of inland states. "We cannot impute to the Framers of the

Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views pressed upon us by the manufacturers." (*Youngstown Sheet & Tube Co. v. Bowers, supra,* at page 550.[6]

In our opinion, *Youngstown* requires that the full inventory in the possession of plaintiffs, committed to the purpose of manufacture, on the first Monday in March, is subject to tax. **We so hold.**

Anchor, Clayton and Bemis Bros. Bag Company, have also appealed from that portion of the judgment dismissing their fourth and fifth causes of action on the ground that they had failed to exhaust their administrative remedies. The gist of these causes of action is that the assessment against them was at a ratio of 50% of actual value, whereas the prevailing assessment ratio for real property was 20.4%. They complain of an overassessment. They allege they did not bring the issue first to the Board of Equalization because other taxpayers had brought identical cases before the Board and in such identical cases the Board stated its policy was to tax the type of property here involved at a 50% ratio. These manufacturers plead no valid excuse.

The cases in this state requiring the exhaustion of administrative remedies where overvaluation is claimed, are legion. (See, e.g. *Dawson v. County of Los Angeles,* 15 Cal. 2d 77, 81; *Eastern-Columbia, Inc. v. County of Los Angeles,* 61 Cal. App. 2d 735, 745; *Marsh Wall Products, Inc. v. County of Los Angeles,* 193 Cal. App. 2d 58, 61; *Lockheed Aircraft Corporation v. County of Los Angeles,* 207 Cal. App. 2d 119, 130-131.)

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[6]See Crosskey, *Politics and the Constitution in the History of the United States,* pp. 299-323 (1953, University of Chicago Press.)

In *Star-Kist Foods, Inc. v. Quinn,* 54 Cal. 2d 507, the court states at pages 509-510: "* * * Ordinarily a taxpayer seeking relief from an erroneous assessment must exhaust available administrative remedies before resorting to the courts. [Citations omitted.] Prior application to the local board of equalization has not been required, however, in certain cases where the facts were undisputed and the property assessed was tax-exempt [citations omitted], outside the jurisdiction [citations omitted], or nonexistent [citations omitted]." In the cases at bench the taxpayers plead none of these circumstances.

Moreover, the administrative denial of relief in other cases has been held to be no excuse for failure to first take advantage of available administrative remedies (*Abelleira v. District Court of Appeal,* 17 Cal. 2d 280, 300-301; *The City of Los Angeles v. California Towel & Linen Supply Company,* 217 Cal. App. 2d 410, 419-420.)

We note that the manufacturers here had gone to the Board of Equalization on the issue of the Import Clause. Why they did not raise the overassessment issue at that time, does not appear. We cannot assume, however, that if they had shown that a different assessment ratio was being applied to real and personal properties throughout the county, that the Board would have upheld the tax against them.

For the reasons stated above, we hold that that portion of the judgment restricting the taxable property to a five-day supply must be reversed with directions to deny any refund to all of the taxpayers. Since the facts are either stipulated or admitted, the trial court is directed to vacate its findings in each case in which the

tax in question is limited to a five-day supply of imported material and to make a finding that the tax as levied was proper, and further, to vacate that portion of the judgment granting a refund to plaintiffs and enter judgment for defendants inclusive of their costs. That portion of the judgment dismissing the fourth and fifth cause of action of Anchor Post, Clayton Manufacturing Company and Bemis Brothers Bag Company, is affirmed.

Defendants are to recover costs.

Roth, *P. J.*

We concur:

Herndon, *J.*

Fleming, *J.*

## APPENDIX B.

### Opinion of the Trial Court.

The Court: We all recognize that, under the Supreme Court's decisions, each case stands on its own feet and, as the Court said, "the reconciliation of the competing demands of the constitutional immunity and the state's power to tax is an extremely practical matter," the Hooven case said.

We must approach the question as to whether these materials had been "put to the use for which they had been imported," with full awareness of realities and treat with them in a practical way. [162]

"It is quite clear that whether or not the package has been broken is only one of the factors to be considered in determining whether they are being used for the purpose for which they were imported." You can find that at page 500 of the Youngstown decision. When I speak of the "Youngstown case," I am speaking of Youngstown and Algoma cases.

Counsel are far apart in their determination of this practical matter. Logically, the defendant's position would lead, in most cases, to the conclusion that, when the goods were once received and stored in a place where they were to remain until used in the course of manufacture, that they lost their immunity as imports. However, that is held directly to the contrary in the Hooven case where the court declares that, as recited in the Youngstown case, that did not cause the hemp to lose its immunity even though it was being stored there for later manufacturing use.

On the other hand, the plaintiffs' counsel contends that the practical needs consist of a sufficient supply to

maintain the operation of the plant as orders are received and need for manufacture arises, and that under the evidence in this case only a five-day supply is needed.

Applying that to the Hooven case wherein hemp was stored—and stored for later use in manufacture by [163] the importer—it did not lose its constitutional immunity from local taxation; and that the practical method of determining when it did so was a period of time which a prudent manager would have to consider in determining the supply necessary to be kept on hand to maintain the manufacturing requirements as need arose.

Now, in the Youngstown case, we had three types of goods, and you remember I speak of the Youngstown case as including the Algoma case. One was ore which was received from time to time, placed in piles, separate piles because it was necessary by reason of the different types of ore, drawn on for daily needs from those piles. As new ore was received, it was dumped on the same piles apparently over whatever remained of the prior imported ore of like character, and the lower court held that it lost its identity being comingled with the other iron ore imported at different times even though the ores came—or that ore, the former ore, came from the same country and after much of said ore had been removed for manufacture.

The state court also held with respect to the lumber and veneers that they "had been irrevocably committed to 'use in manufacturing' at that plant, were 'necessarily required to be kept on hand to meet its current operational needs.'" and were being used in manufacture and had lost their character as imports.

The United States Supreme Court held that under [164] the facts as found that the findings of the court in that regard were amply supported by the evidence; that the lumber and veneers were not only needed but they had been irrevocably committed to supply and were actually being used to supply the day to day manufacturing requirements. It would appear that those were large operations. It was apparently a more or less constant manufacturing operation, more or less constant needs, and differ materially from our facts in regard to operational matters of our plaintiffs.

Before I touch upon that, it is well to remember that all the Supreme Court says is that the findings of the lower court were sustained by substantial evidence, were amply supported by the evidence which is nothing more than saying that our substantial evidence rule controlled the Supreme Court. So, we are confronted with the problem of determining for ourselves in each of these cases when the respective goods lost their constitutional immunity as imports by being irrevocably committed to the manufacture by being necessarily required to be kept on hand to meet the manufacturer's current operational needs and by being used in manufacture, as Mr. Baker pointed out in his argument.

In all of the cases, according to the testimony of the witnesses, a five-day supply was needed to meet the current operational needs. That was true except for the Bemis case in which there was no manufacturing conducted [165] immediately before or immediately after the tax date, the levy date, March 7, 1960. The first manufacturing done was some three weeks later, and if there was any shortage, it would be met by a supply from other plants within 24 hours' notice.

It seems to me that one of our problems is to consider whether the mere fact that, by reason of goods being imported, it was a practice to keep on hand more than that which was required for good business practice to meet the orders as they came in. There was a factor that the goods were imported that had—was a factor which resulted in a supply on hand in these cases, in each of these cases, being much larger than that which could be foreseen for the—by a reasonably prudent manager as needed for the immediate future.

Apparently these companies were comparatively small in operation when compared with the manufacturing companies involved in the Youngstown case, particularly in our furniture case, Custom Furniture depending on orders. The manager would determine by the week in advance as to—as best he could, as to what supply would be needed in the ensuing week and the production manager would then determine the quantity which would supply the manufacturing end of the business with sufficient goods to maintain the production for the ensuing five days. So, it seems to me that, while in some cases a consideration [166] might be given to the length of time it would take for goods to be received after they had been ordered, the extent of that consideration would depend on each individual case.

Now, in our cases, we have no evidence but that supply was unlimited. There was nothing irregular about the receipt of the goods. They could come in each month in one case or could come weekly or could have been arranged to come even oftener than that.

Mr. Early: Your Honor, that was counsel's argument. There is no evidence whatsoever to that effect.

The Court: We have no evidence to the contrary, Counsel.

Mr. Early: No evidence on the point either way.

The Court: None whatsoever except to assume—and I think we can infer—in regular business practices, unless otherwise shown, goods are received as ordered, given the usual length of time that may be taken in transit. So, I don't believe we could give much consideration, if any, to that feature of it. If we did, we could well have the case where, because the manufacturer feared that there was going to be a raise in the prices, he would lay in a year's supply of goods, or because he believed there might be a drop in orders, he would hold his supply to five days or two or three weeks. I agree that element goes primarily to the import side of the question rather than the [167] operational needs which we are primarily interested in.

In connection with the regularity of supply, it is a matter of common knowledge of the prevalence of shipping, and the great competition that exists among shipowners or businesses, great competition that exists among manufacturers in various countries to obtain markets in other countries and therefore their full cooperation in filling orders as rapidly as possible. While we have no direct evidence on this subject I think it can be inferred from the nature of these goods that there is nothing about them that would cause any irregularity in them being available for order and shipping and use by the various plaintiffs in this case. I feel there is great significance to the decision in the Hooven case that the mere fact the goods were imported and stored, the hemp, and stored for the purpose

of manufacturing did not cause them to lose their immunity.

In the Youngstown case we had no evidence, at least none is recited, as to the number of days' supply it was necessary to keep on hand or if the manufacturer attempted to estimate that supply. Of course, our cases are directly to the contrary. The operation of the plants were controlled by the day to day orders. In each case, the need for goods or imported goods could be and were determined according to the orders received. As I have already stated, in each case, the evidence was to the [168] effect that only a five-day supply was necessary to be kept on hand to meet current operations.

It appears to the Court that, following the directions of the United States Supreme Court, that we should find that the practical method of determining when the goods lost their immunity by being either irrevocably committed—and I stress "irrevocably"—to use in manufacture by being necessarily required to be kept on hand to meet the manufacturer's current operational needs and by being used in manufacturing would be by finding that those events occurred only as to the quantity of goods that constituted a five-day supply. That is true as to all except the Bemis case in which, at the time of assessment, no manufacturing operations were carried on or intended to be carried on according to the evidence. The goods remained in storage as they had been received and, at that time, none were needed or necessarily required to meet the current operational needs of the manufacturer.

So, the finding is in substance that, as to the plaintiff Bemis, none of the goods have lost their consti-

tutional immunity to local taxation, and as to the other three plaintiffs, only a five-day supply had so lost its immunity and none of the other goods levied upon had lost such immunity. [169]

In any event, proceeding with a declaration of the Court's findings, the Court finds that there was no discrimination under Count III by reason of the freedom of imported goods from taxation which had been imported for the purpose of resale and the taxation or attempt to tax goods that had been imported for manufacturing. The Supreme Court has refused to hold that. Whatever its reasons may be, we are bound by it. Its reasoning apparently is based upon the fact that such goods continue to be imports and therefore—that is, goods imported for resale—and therefore they remain as imports and therefore were free from local taxation. As a matter of fact, I don't see, under the rulings of the Supreme Court, how [170] it could arrive at any other conclusion with respect to the question of discrimination.

The Constitution declares one to be immune. First, all goods are taxable—all property is taxable by the local taxing agency unless it is excluded by some law of the County or State or by Constitutional prohibition either by the Constitution of the state in question or by the Constitution of the United States. [171]

The Court: As an addendum to the Court's opinion this morning in respect to our primary question under Counts I and II, the Court touched upon one phase of it but not to the extent that it should have nor to the extent that it did consider the subject prior to taking the bench this morning and during the course of argument yesterday.

As most of us do—I am speaking of lawyers and judges generally—I approached the case from both sides, there being much that was arguable on each side. But when I was considering the approach of the defendant, I found myself against a serious obstacle in attempting to find that a two-months' supply or a supply measured in the length of time between order and receipt could be said to be irrevocably committed to "use in manufacture" or "necessarily required to be kept on hand to meet the manufacturer's current operational needs," or being used in the manufacture and having lost their character as imports thereby the fact that, in each of these cases, it is quite apparent that there was continually a large supply of goods on hand which varied from something over a month to five or six months. In all of the cases, there was a regular flow of goods from the foreign country.

For instance, in the steel tubing or the wire [196] rod case, supplies were ordered annually and delivered monthly, if I remember correctly.

Mr. Baker: I think that was the Virtue case, the plywood case, your Honor.

The Court: You are correct. That was in the Virtue case, testified to by Mr. Parke. In that connection, we also had the testimony which indicated, to some extent, in all but the seasonal case, the varied amounts that were on hand so that we not only had to consider—the Court had to consider the amounts that were on hand but the amounts that were in transit. From time to

time as shipments were received, there would be a much larger amount on hand than the six-weeks' supply or the two-months' supply or in connection with the amount of time that would lapse between order and receipt. So that apparently, since they only needed a five-day supply—except for the Bemis case—to be kept on hand to meet their needs, they actually had a large quantity in each case, large quantities on hand which could have been used for other purposes if the plaintiffs desired.

We do know in one case, the plaintiff kept an extra supply on hand, which was not assessed in this case, but which could be sent around the country to other plants as needed.

Now, we have no evidence as to any other use being made of the supply in storage than the eventual [197] manufacture, but there was no reason why each of those plaintiffs could not have sold or shipped for some purpose or other a large quantity of that which it had on hand without in any way interfering with his manufacturing processes because of the regular flow of goods from Europe.

Under the evidence, we don't have the situation where the supply on hand was generally drawn down to a few days' supply when the new supply came in; but rather, under the stipulations and the evidence, it would appear that at all times there was kept on hand anywhere from a month to several months' supply of goods. So, at the particular date, as I have stated, when the

shipment arrived, it immediately greatly increased over and above the normal supply on hand the total quantity on hand. That being so, I found myself unable to agree with Mr. Early and find that that entire quantity on hand at any time or a two or three-months' supply on hand or any more than a five-day supply had at any time been "irrevocably committed to use and manufacture," or "necessarily required to be kept on hand for current operational needs," or "actually being used in manufacturing."

Now, it may be that some intermediate figure might be adopted by some court who considered this problem, but I fail to see how it could in this case. I can't follow the reasoning that the entire two or three-months' supply lost its immunity, its constitutional immunity, nor [198] any evidence I have which would permit me to find a different quantity measured in daily use time than the five days which I have generally found. [199]

## APPENDIX C.

### Issues of Fact and Law in the Trial Court.

[**Anchor** Tr., p. 70, line 24, to p. 71, line 11.]

ISSUES OF FACT

The following issues of fact remain to be determined by the court:

1. The imported character of the property taxed.
2. The manner of its importation and storage.
3. Whether said steel tubing, or any of it, had been committed to plaintiff's manufacturing process on the tax lien date.
4. How much, if any, of said steel tubing was required for plaintiff's current operational needs as of 7 March 1960; also, what should be the tax on that amount of steel tubing.

ISSUE OF LAW

How much, if any, of the steel tubing which is the subject matter of this action was exempt from property taxation by defendants as of the first Monday in March, 1960 by reason of the provisions of Article 1, Section 10 of the United States Constitution which provides in part that "No State shall . . . place any Impost or duties on Imports . . ."?

[**Clayton** Tr., p. 71, line 24, to p. 72, line 11.]

ISSUES OF FACT

The following issues of fact remain to be determined by the court:

1. The imported character of the property taxed.
2. The manner of its importation and storage.
3. Whether said steel tubing, or any of it, had been

committed to plaintiff's manufacturing process on the tax lien date.

4. How much, if any, of said steel tubing was required for plaintiff's current operational needs as of 7 March 1960; also, what should be the tax on that amount of steel tubing.

ISSUE OF LAW

How much, if any, of the steel tubing which is the subject matter of this action was exempt from property taxation by defendants as of the first Monday in March, 1960 by reason of the provisions of Article 1, Section 10 of the United States Constitution which provides in part that "No State shall . . . place any Impost or duties on Imports . . ."?

[**Virtue** Tr., p. 60, line 27, to p. 61, line 12.]

THE FOLLOWING ISSUES OF FACT REMAIN TO BE DETERMINED

1. The imported character of the merchandise.

2. The manner of its importation and storage.

3. Whether or not the merchandise had been committed to Plaintiff's manufacturing process.

4. How much, if any, of the plywood was on March 7, 1960, required for plaintiff's current operational needs and what should be the tax on that merchandise?

ISSUE OF LAW

How much, if any, of the plywood which is the subject matter of this action was exempt from property taxation by defendants as of the first Monday in March, 1960 by reason of the provisions of Article 1, Section 10 of the United States Constitution which provides in part that "No State shall . . . place any Impost or duties on Imports . . ."?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1252~~ 170

VIRTUE BROS., ANCHOR POST PRODUCTS, INC., of California, and CLAYTON MANUFACTURING COMPANY, *Petitioners,*

v.

THE COUNTY OF LOS ANGELES, THE CITY OF LOS ANGELES, and THE CITY OF WHITTIER, *Respondents.*

**On Petition for a Writ of Certiorari to the California District Court of Appeal, Second District, Division II**

## RESPONDENTS' MEMORANDUM

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**On Petition for a Writ of Certiorari to the California District Court of Appeal, Second District, Division II**

## RESPONDENTS' MEMORANDUM

### I.

In the cases at bar the California District Court of Appeal placed an entirely different interpretation on the "current operational needs" test enunciated in *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U.S. 534 (1959), than the interpretation given to said test by *The City and County of Denver* v. *Denver Publishing Co.,* 153 Colo. 539, 387 P.2d 48 (1963), and *Orr Felt & Blanket Co.* v. *Schneider,* 3 Ohio 2d 14, 209 N.W. 2d

150 (1965). Because of the novelty of the constitutional question raised by these conflicting state court decisions, and the importance to the taxpayers and taxing authorities in the State of California, as well as those in every other state, to have the question resolved, Respondents join the Petitioners in urging this Court to grant the Petition for Certiorari.

However, Respondents do not agree that the California District Court of Appeal construed *Youngstown's* "current operational needs" test in the manner represented in the Petition for Certiorari. That is, said construction does not omit "the last crucial element" of the test involved, as Petitioners claim. The District Court of Appeal did hold that "*Youngstown* requires that the full inventory [of imported plywood, steel tubing, and wire] in the possession of plaintiffs, committed to the purpose of manufacture, on the first Monday in March, is subject to tax." But, that holding is clearly based upon the premise that the full inventory had been "entered" and "used" in "manufacturing", in the sense that all of the taxed materials were required by plaintiffs' "current operational needs".

The District Court of Appeal found that since the materials in the cases at bar (1) "had reached the end of their importation journey", (2) "indiscriminate portions of the whole were actually being used to supply daily operating needs", and (3) all of the materials were purchased for use in manufacturing and in the normal course of events actually would be so used within a period of six months, the full inventory had been committed irrevocably to "use in manufacturing"; and, accordingly, held that the full inventory was required to meet "current operational needs" as that term is defined in *Youngstown.*

Therefore, Respondents submit that the District Court of Appeal correctly decided that the Import-Export Clause of the U. S. Constitution, Article I, § 10, cl. 2, does not interdict the tax here under attack. Respondents also submit that the decisions in *The City and County of Denver* v. *Denver Publishing Co., supra,* and *Orr Felt & Blanket Co.* v. *Schneider, supra,* are erroneous insofar as they construe *Youngstown* as holding that the Import-Export Clause prohibits a tax on imports to be used in manufacturing, unless such imports will be so used "before the time needed to secure a new supply [of similar imported materials] would elapse".

## II.

In the cases at bar no material was imported for sale, before being incorporated in a manufactured article. Therefore, the distinction which the District Court of Appeal made between material imported for sale and material imported for manufacture is *dictum.* However, Respondents agree with Petitioners that if the "current operational needs" test set forth in *Youngstown,* as interpreted by the District Court of Appeal in the cases at bar, is valid as to imports for manufacture, it must be equally valid as to imports for sale. In other words, if imports for sale have reached the end of their importation journey, are stored in their original packages awaiting sale, some of those original packages are selected at random and removed from storage to consummate daily sales, and those remaining in storage actually will be sold in the reasonably near future, it is Respondents' position that the Import-Export Clause of the Constitution does not forbid the imposition of a state *ad valorem* personal

property tax upon the full inventory. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964) does not hold otherwise. Certainly, such materials for sale are no less "incorporated and mixed up with the mass of property" within the State, than the materials for manufacture involved in the cases at bar.

If imports for sale, in the circumstances set forth in the preceding paragraph, are not subjected to the taxing power of California, it will not be because this State has violated the United States Constitution, Amendment 14, Section 1, Clause 4, by denying persons "within its jurisdiction the equal protection of the laws", but because the Supreme Court of the United States holds that the Import-Export Clause of the Constitution cannot be applied to merchandise imported for sale in the same manner as it has been applied to merchandise imported for manufacture.

Respectfully submitted,

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